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IN THE

Supreme Court of the United States

October Term, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,

Appellants,

—v.—

WARREN E. SPAHN,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee, Warren E. Spahn, moves to dismiss the appeal herein, pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that the appeal herein does not present a substantial federal question.

Statement

This is an appeal from a judgment of the Court of Appeals of the State of New York, dated October 27, 1966, unanimously affirming the judgment of the Appellate Division of the New York Supreme Court, First Department, dated June 6, 1965, which likewise unanimously affirmed the judgment of the New York Supreme Court, County

of New York, dated May 28, 1964, in favor of appellee, after trial without a jury, awarding him an injunction and money damages in the action brought under the New York Right of Privacy statute, §§50-51, New York Civil Rights Law.

The opinion of the Court of Appeals is set forth in "Appendix B" of appellants' jurisdictional statement, and is reported in 18 N. Y. 2d 324, 221 N. E. 2d 543. The opinion of the Appellate Division is set forth in "Appendix C" of the jurisdictional statement, and is reported in 23 A. D. 2d 216, 260 N. Y. S. 2d 451. The opinion of the trial court is set forth in "Appendix D" of the jurisdictional statement, and is reported in 43 Misc. 2d 219, 250 N. Y. S. 2d 529.

Counter-question Presented

The only question on this, appellee's motion to dismiss the appeal herein is whether appellants' jurisdictional statement presents a substantial federal question as warrants the Court noting probable jurisdiction.

It is respectfully submitted that the question should be answered in the negative.

Notwithstanding this Court's very recent pronouncement on the identical propounded constitutional question in *Time, Inc.* v. *Hill*, —— U. S. ——, 17 L. Ed. 2d 456 (January 9, 1967), appellants' appeal nonetheless again seeks review of the same statute, §§50-51, New York Civil Rights Law, and upon the very same constitutional grounds, to wit: that said statute abridges protections for speech and press.

Factually, the New York courts in the case at Bar, have construed the Right of Privacy statute to protect

a public figure from an unauthorized commercial exploitation of his personality not in the public interest. The findings of fact reveal that appellants did knowingly and with reckless falsity write and publish an intentionally fictionalized version of appellee-public figure's life story, without his consent and did also infringe on his intimate and non-public private life.

Counter-statement of Fact

A. *Nature of the Action.*

Appellee, Warren Spahn, a well-known professional baseball pitcher, sought an injunction and money damages against the unauthorized publication of a book entitled, "The Warren Spahn Story", purporting to be a true biography of his life. The case was tried without a jury and appellee was awarded $10,000. and was also granted an injunction. Judgment was unanimously affirmed initially by the Appellate Division and also in like manner by the Court of Appeals.

B. *The Findings of Fact.*

Sitting as sole trier of fact and law, the Court adduced and found from the evidence that appellants' book (1) was published without appellee's knowledge or authority (Appendix D, p. 17d, jurisdictional statement); (2) is a dramatized and non-factual version of appellee's purported life story (Appendix D, pp. 13d-14d, jurisdictional statement; see also Appendix C, pp. 3c-7c); (3) substantially and materially untrue (Appendix D, pp. 12d, 15d, 17d-18d, jurisdictional statement; see also Appendix B, p. 3b and Appendix C, pp. 3c-4c, 6c-7c); (4) inaccurate, distorted

and fantasied (Appendix D, pp. 17d-18d, jurisdictional statement); (5) substantially embodies, both quantitatively and qualitatively, intimate facets of appellee's life, including publication of untrue personal relationships with his family, distinct and quite apart from the truthful and otherwise newsworthy professional career, as well as placing appellee in a false light by use of invented and concocted introspectives in the revelation of his innermost and personal thoughts (Appendix D, pp. 15d-16d, 18d, jurisdictional statement); and (6) was written and published with knowledge of its falsity and in reckless disregard of the truth (Appendix D, pp. 15d-18d, jurisdictional statement; see also Appendix C, pp. 3c-5c).

C. *Conclusions of Law.*

Based on findings of fact and the trial record, the Courts below unanimously concluded, as a matter of law, that appellants' book, "The Warren Spahn Story", goes far beyond constitutionally protected reportorial dissemination, transmuting it into an unauthorized commercial exploitation of appellee's personality and thereby invades his right of privacy as statutorily protected in §§50-51, New York Civil Rights Law.

ARGUMENT

No substantial federal question is raised by this appeal.

A. *Constitutionality of New York Privacy Statute Upheld in 1967.*

In *Time, Inc.* v. *Hill,* —— U. S. ——, 17 L. Ed. 2d 456 (decided, January 9, 1967), the constitutionality of the New York Privacy statute (§§50-51, New York Civil Rights Law), was considered and sustained.[1]

Appellants acknowledge the Court's "extensive review of the New York Law in *Time, Inc.* v. *Hill*" (p. 9, footnote 1, juris. statement). Appellants likewise defer to a footnote where we are advised that the issue raised by their appeal is whether the New York law may be construed as to restrain publication of an unauthorized and substantially untrue version of a public figure's life in which he is "identified as its subject" (p. 9, footnote 1, juris. statement).

Preceding this Court's expression in the *Hill* case, the New York Court of Appeals, on October 27, 1966, delivered its opinion in this, the *Spahn* case.[2] Inasmuch as the iden-

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[1] The judgment of the Court of Appeals was set aside and the case remanded for further proceedings not inconsistent with the opinion of the Court. The constitutional command, however, was "narrowly limited" to the trial judge's failure to instruct the jury that a "verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article" (p. 22, maj. opin.).

[2] *Warren E. Spahn* v. *Julian Messner, Inc., and Milton J. Shapiro,* 18 N. Y. 2d 324, 221 N. E. 2d 543, aff'g 23 A. D. 2d 216, 260 N. Y. S. 2d 461, aff'g 43 Misc. 2d 219, 250 N. Y. S. 2d 529. The trial court's judgment in favor of appellee herein was unanimously affirmed, on the law and facts by both the intermediate and high appellate New York courts.

tical statute was questioned in both the *Hill* and *Spahn* cases, this Court's understanding of the New York courts' First Amendment construction in connection therewith was "materially" aided (p. 5, maj. opin.).

In the *Hill* case, as do appellants in the case at Bar, it was argued that the New York privacy statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without the finding of knowing or reckless falsity. Mr. Justice Brennan, fully cognizant of the totality of the thesis hypothecated and of the Court of Appeals' holding that the constitutional command of this Court in *New York Times* v. *Sullivan*, 360 U. S. 254, had no application in *Spahn*, nonetheless concluded (p. 22, maj. opin.):

> "The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this is the view of the New York courts."

In the *Hill* pronouncement of the statute's constitutionality, Mr. Justice Brennan ascertained (p. 22, maj. opin.):

> "The New York Court of Appeals, as the *Spahn* opinion demonstrates, has been assiduous to construe the statute to avoid invasion of the constitutional protections for speech and press. We therefore confidently expect that the New York courts will apply the statute consistently with the constitutional command."

Consequently, if the *Spahn* case, to the satisfaction of the Court in *Hill*, has demonstrated the New York courts' de-

termination to apply constitutional mandates in construing the privacy statute, the same *Spahn* case cannot, as Dr. Jekyll to Mr. Hyde, degenerate into the statute's assassin.

B. *Appellants' Knowing and Reckless Falsity Proved.*

Unlike the deceived, the fabricator is the first to know his own child. And the calculated falsehood, "knowingly and deliberately published" enjoys no constitutional immunity (*Time, Inc.* v. *Hill, supra,* pp. 14-15; *The New York Times* v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U. S. 64, 75; and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572).

Upon the trial herein, the author testified (1) that he invented dialogue, manufactured scenes from his imagination and concocted introspective thoughts falsely attributed to appellee solely for dramatic effect in order that the book be more commercially attractive to juveniles (Record, pp. 624-756), and appellants' counsel conceded these facts (Record, p. 689), as he concedes them now (pp. 4-8, juris. statement); (2) that his "inventions" such as dialogue and "introspective thoughts" were "created" by him "based upon a secondary source" (Appendix D, p. 16d, juris. statement), none of which were researched for accuracy nor competency and frequently were in conflict with each other; (3) that he never interviewed appellee, members of his family, friends, associates, fellow ballplayers, nor did he seek reliable information readily available from the publicity offices of appellee's baseball team, the National League nor the Baseball Commissioner's office (Record, pp. 637-648); and (4) that up to trial time, he had "written" a total of thirteen (13) books, twelve (12) of which were sport biographies in which he resorted to the identical technique of

Tom Swiftizing the subjects which were jointly selected by the author and publisher (Record, pp. 665-666).

The book consisted of a total of 2,909 sentences. Appellee's testimony, including his verified trial bill of particulars, which was subject to cross-examination, was that a total of 1,532 sentences, or approximately 53% of the total number of the book's sentences were untrue. An additional 895 sentences, or approximately 31% consisted of unsubstantiated conjectures drawn from the author's fertile imagination and based on his own recollection of the relevant historical era.

In other words, approximately 85% of appellants' book is non-factual. There can be no question here concerning the "substantiality" of appellants' fictional and thus commercial enterprise.

Concurring with the trial court, the Court of Appeals concluded that appellants' falsifications "go far beyond the establishment of minor errors in an otherwise accurate biography . . . " (Appendix B, p. 3b, juris. stat.). They establish "dramatization, imagined dialogue, manipulated chronologies and fictionalization of events" (Appendix C, p. 5c, juris. stat.). "Fictionalization" is the heart of the cases in point (*Spahn, supra,* at p. 328, 221 N. E. 2d 545). Mr. Justice Brennan ascertained "material and substantial falsification" as the "Test" (pp. 11-12, maj. opin., *Hill* case).

Based upon the evidence, the trial court deduced (Appendix D, p. 17d, juris. stat.):

> "• • • the record unequivocally establishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual

> errors, distortions and fanciful passages . . . Although so tightly interwoven as to defy extrication of the one from the other, the offending characteristics of the book comprehend a non-factual novelization of plaintiff's alleged life story and an unauthorized intrusion into the private realms of the baseball pitcher's life . . . "

The trial court concluded (Appendix D, p. 18d, juris. stat.):

> "That the book violates the interdiction of Article 5, of the Civil Rights Law is the compelling conclusion that the writing constitutes a product . . . a creation, both in *form* and *content* . . . of the author's artistic imagination."

Appellants argue that in construing the privacy statute, the New York courts' denial of accepting as applicable the *New York Times* v. *Sullivan (supra)*, and now, *Time, Inc.* v. *Hill (supra)* edicts, requires this Court's constitutional annulment of §§50-51, New York Civil Rights Law. It is respectfully submitted that the suggestion is wholly without merit and must be rejected.

The findings of fact and record are replete with examples of the author's substantial inventions, creations and fabrications admittedly sired by him. This overwhelming attestation can only be denominated as appellee's proof of appellants' knowing and reckless falsity. Additionally, the trial court acknowledged (Appendix D, p. 15d, juris. stat.):

> "* * * the all pervasive distortions, inaccuracies, invented dialogue, and the narration of happenings out of context, clearly indicate, at the very least, a *careless disregard for the responsibility of the press* . . . ." (Emphasis supplied.)

Undoubtedly, the publisher shared with its author the latter's "knowing and reckless falsity" imbued in their work of fiction. Indeed, it was the opinion of the Appellate Division (Appendix C, p. 3c, juris. stat.):

> "In short, defendants made no effort and had no intention to follow the facts concerning plaintiff's life, except in broad outline and to the extent that the facts readily supplied a dramatic portrayal attractive to the juvenile reader."

Appellants urged upon the trial and subsequently that the creation of dialogue based on secondary sources and the other techniques were not original with them and therefore should be permitted to continue. Commenting upon this aspect, the trial court stated (Appendix D, p. 17d, juris. stat.):

> "That the foregoing procedure outlined by the author constitutes the customary practice affords no basis for legal justification of defendants' transgression and appropriation of plaintiff's name, portraiture and picture for purposes of trade."

Startling corroboration of appellants' knowledgeable bad faith is manifest by mere comparison of appellee's trial exhibits "A" and "A1". Exhibit "A" is appellants' original book and target of appellee's action commenced on July 28, 1958. The copyright therein reveals its publication in 1958. Exhibit "A1" differs from exhibit "A" in that the former is a subsequent edition containing an *additional Chapter* together with a *supplemental statistical appendix* bringing the book "up to date" in 1959, *one (1) year after appellee commenced his action!*

The testimony of Louis Scholder, an officer of appellant publisher, attests to six (6) printings of "The Warren Spahn Story". "The first printing, approximately April, 1958. The second, January, 1959. The third, December, 1960. The fourth, April, 1962. The fifth, June, 1962. And the sixth, August, 1963" (Record, p. 637).

Clearly then, appellants' knowledge of falsity is amply demonstrated to have been a calculated and deliberate conversion of appellee's personality.

C. *The Public Figure, While Afforded Little Privacy Protection, Is Safeguarded From the Fictitious Report Whether Its Subject Matter Be Defamatory or Non-defamatory.*

Claimants in both the *Spahn* and *Hill* cases were public figures. Whether such by choice or involuntarily nonetheless subjects the public figure to the "often searching beam of publicity and that in balance with the legitimate public interest, the law affords his privacy little protection" (*Spahn, supra,* at 328, 221 N. E. 2d 543, 544, cited at p. 9, maj. opin. *Time, Inc.* v. *Hill, supra*). This is not to say, however, that a public figure is wholly and irrevocably dedicated to the public domain, absent any right in and to himself (pp. 9-11, maj. opin., *Hill* case, *supra*).

The public figure, insofar as his career is dedicated to the public or is the subject of an item of legitimate public interest, is substantially without a right of privacy. But his personality may not be the subject of another's unauthorized commercial exploitation. This truism is understandably axiomatic whether the commercial exploitation be in the form of an unauthorized fictional story or the publication of an advertisement in which, without his approval,

the public figure's name or picture is used to endorse a product. Conversely, the New York privacy statute affords protection to factual disseminations of newsworthy persons and events (*Spahn, supra,* at 328, 221 N. E. 2d 543, 545, cited at p. 11, maj. opin. in *Hill* case).

As a public figure, appellee is newsworthy and publication of his *factual* biography is without the statute's protection notwithstanding want of consent. On the other hand, the unauthorized and *intentionally fictionalized* publication constitutes the commercial exploitation of his personality, subject to statutory redress (pp. 10-11, maj. opin. in *Hill* case).

Appellants' "question presented" in their jurisdictional statement resorts to a hopeful and desired distinction between the fictional publication patently defamatory and that which on its face is non-defamatory. Apposite thereto, Mr. Justice Brennan in the *Hill* case perceptively illustrates the refinement between privacy and libel actions. Whereas it is true, that both actions *may* claim *damages* resulting from injury to reputation, in privacy cases, the "primary damage is the mental distress from having been exposed to public view" (p. 10, footnote, maj. opin., *Hill* case; see also Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093, 1124 (1962)).

Consequently, and again referring to *Spahn* as authoritatively illustrative, Mr. Justice Brennan comprehends that "the published matter *need not be defamatory,* on its face or otherwise, and *might even be laudatory* and still warrant recovery" (p. 10, footnote, maj. opin., *Hill* case; emphasis supplied).

D. *The Decision in* Time, Inc. v. Hill *Is Decisive and Controlling.*

The compelling conclusion reached from this Court's opinion in *Time, Inc.* v. *Hill, supra,* is that the New York privacy statute as construed by the New York courts, does not offend constitutional protections of press and speech.

CONCLUSION

This appeal does not present a substantial federal question and, accordingly, should be dismissed.

Respectfully submitted,

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